

1 KELLY A. JOHNSON
 Acting Assistant Attorney General
 2 BARCLAY T. SAMFORD (NM SBN 12323)
 Trial Attorney
 3 United States Department of Justice
 Environment and Natural Resources Division
 4 Suite 945, North Tower
 999 18th Street
 5 Denver, CO 80202
 Telephone: (303) 312-7362
 6 Facsimile: (303) 312-7379
 Clay.Samford@usdoj.gov
 7 BRIAN C. TOTH (Virginia SBN 48843)
 Trial Attorney
 8 United States Department of Justice
 Environment and Natural Resources Division
 9 P.O. Box 663
 Washington, D.C. 20044-0663
 10 Telephone: (202) 305-0639
 Facsimile: (202) 305-0506
 11 Brian.Toth@usdoj.gov

12 KEVIN V. RYAN (SBN 118321)
 United States Attorney
 13 CHARLES M. O'CONNOR (SBN 56320)
 Assistant United States Attorney
 14 Environment & Natural Resources Unit
 450 Golden Gate Avenue, Box 36055
 15 San Francisco, California 94102
 Telephone: (415) 436-7180
 16 Facsimile: (415) 436-6748

17 Attorneys for Federal Defendants

18 **UNITED STATES DISTRICT COURT**
 19 **NORTHERN DISTRICT OF CALIFORNIA**
SAN FRANCISCO DIVISION

20 KARUK TRIBE OF CALIFORNIA,)
)
 21 Plaintiff,)
)
 22 v.)
)
 23 UNITED STATES FOREST SERVICE;)
 MARGARET BOLAND, Forest Supervisor,)
 24 Klamath National Forest,)
)
 25 Federal Defendants,)
)
 26 and)
)
 27 THE NEW 49ers, Inc. and RAYMOND KOONS,)
)
 28 Defendant-Intervenors.)

Civ. No. 04-4275 (SBA)

FEDERAL DEFENDANTS'
MOTION TO STAY PLAINTIFF'S
PETITION FOR ATTORNEYS'
FEES

Date: January 31, 2006

Time: 1 p.m.

Ctrm: 3, 3rd Floor

Judge: Hon. Sandra B. Armstrong

MOTION

COME NOW defendants the United States Forest Service ("Forest Service") and Margaraet Boland in her official capacity as Forest Supervisor of the Klamath National Forest (collectively, "Federal Defendants"), who move to stay the litigation of Plaintiff's petition under the Equal Access to Justice Act ("EAJA") for fees and costs. [Doc. No. 107]. Federal Defendants have consulted with counsel for Plaintiff, who opposes this motion. Federal Defendants' motion is noticed for January 31, 2006, at 1 p.m. before the Honorable Sandra Brown Armstrong, Courtroom 3, 3rd Floor, United States District Courthouse, 1301 Clay Street, Oakland, CA 94612. The parties are filing herewith a stipulated schedule seeking to expedite the briefing on Defendants' motion to stay, such that the Court has the opportunity to consider the motion to stay the fee petition before Defendants' opposition to the fee petition is due. For the reasons in the following memorandum, the Court should grant Federal Defendants' motion. A proposed order is being filed herewith.

MEMORANDUM

Federal Defendants hereby request that the Court stay the litigation of Plaintiff's petition for attorneys' fees until the conclusion of Plaintiff's appeal before the Ninth Circuit Court of Appeals. Despite the fact that Plaintiff lost the majority of its case--indeed, *every single claim* that was actually briefed on the merits--Plaintiff now seeks compensation of over \$115,000.00 for work by four separate attorneys. Plaintiff bases its claim to an award of fees on the fact that the parties entered a short stipulated order dismissing Plaintiff's challenges to several plans of operations prior to any briefing of the merits of those claims. While the remainder of Plaintiff's case, which it lost entirely, is on appeal to the Ninth Circuit, Plaintiff is seeking compensation related to the limited claims that were settled through the stipulated dismissal.

The Court should stay the litigation of Plaintiff's fee petition for two important reasons. First, a stay would avoid the piecemeal litigation that would result should this Court's summary judgment ruling be reversed by the Court of Appeals. In such a situation, the Court would have to evaluate twice whether Plaintiff is entitled to fees--once now, and again at the conclusion of Plaintiff's appeal when they would undoubtedly seek fees for that appeal and other work before

the district court on any claims that might be reversed. Staying the litigation of the fee petition until the conclusion of the appeal would therefore promote judicial economy by only requiring the Court to review the fee application once. Second, staying Plaintiff's fee petition would avoid the risk that Plaintiff might be overcompensated should it seek fees following appeal. In particular, Plaintiff is now seeking fees for work done prior to the date of the stipulated dismissal. By its own admission, however, Plaintiff has not separated its work by the claims involved in the case, so Plaintiff is effectively claiming fees for work on issues resolved by the stipulation *and* for its work on issues currently pending before the Ninth Circuit. See, e.g., Pl.'s Decl. of Roger Flynn ("Flynn Decl.") ¶ 7 (some larger tasks, including researching and writing the parties' pleadings, "were not specifically delineated by issue"); Pl.'s Decl. of Jeffrey C. Parsons ("Parsons Decl.") ¶ 7 (same); Pl.'s Decl. of Joshua Borger ("Borger Decl.") ¶ 6 (same). If successful on appeal, Plaintiff might choose to bring a second fee application seeking compensation for some of those same hours. The Court would be in a better position to evaluate whether Plaintiff is seeking double recovery if it is able to evaluate all of Plaintiff's requested hours at once, rather than in the piecemeal fashion that would occur if the litigation were not stayed. For these reasons, Federal Defendants' motion to stay litigation of Plaintiff's fee petition should be granted.

PROCEDURAL HISTORY

This action involved challenges under the National Environmental Policy Act ("NEPA"), National Forest Management Act ("NFMA"), Endangered Species Act ("ESA"), and other statutes and regulations, to suction dredge mining operations on the Klamath National Forest. On April 22, 2005, prior to briefing on the merits, the parties entered a stipulation resolving Plaintiff's claims against five plans of operation. [Docket No. 50]. The parties then briefed the merits of Plaintiff's remaining claims. On July 1, 2005, the Court denied Plaintiff's motion for summary judgment. [Docket No. 104] The Court entered final judgment in favor of Federal Defendants on July 11, 2005 and the case was closed. [Docket No. 105].

1 Plaintiff filed a notice of appeal on September 9, 2005, indicating that it would be
 2 docketing an appeal in the Ninth Circuit Court of Appeals. On October 7, 2005, Plaintiff filed a
 3 petition seeking attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA").
 4 Plaintiff seeks an award of \$115,652.21 for claims that were subject to a stipulated motion to
 5 dismiss that was entered prior to the commencement of summary judgment briefing. [Docket No.
 6 107].

7 ARGUMENT

8 The EAJA provides a limited waiver of sovereign immunity for attorneys' fees and costs
 9 against the United States in cases where Plaintiff is a prevailing party, and in which Plaintiff
 10 demonstrates by a preponderance of the evidence that the federal government's actions were not
 11 substantially justified.

12 The Court "has broad discretion to stay proceedings as an incident to its power to control
 13 its own docket." Clinton v. Jones, 520 U.S. 681, 707-08 (1997) (citing Landis v. North
 14 American Co., 299 U.S. 248, 254 (1936)). This discretionary power extends to the timing of
 15 consideration for petitions for attorney's fees while the matter is under appeal. See, e.g., Glaxo
 16 Group Limited v. Apotex, Inc., 272 F.Supp.2d 772, 778 (N.D. Ill. 2003) (exercising discretion to
 17 stay fee petition until conclusion of appeal). See also, 1st Westco Corp. v. School District of
 18 Phildelphia, 1993 WL 117539 (E.D. Pa. 1993) (staying fee petition pending conclusion of appeal
 19 and noting that "[t]o indulge in the prolix task of parsing the plaintiffs' fee petition with the
 20 requisite sharp pencil, only to find that that jurisprudential adventure in adjudication turned out
 21 to be but an academic exercise, would be the epitome of judicial diseconomy. I do not find that
 22 plaintiffs in this case will suffer undue hardship from having to wait a few months to receive
 23 their award of attorneys' fees, should their ultimate entitlement therefor be determined.").

24 Here, a stay of Plaintiff's fee petition is appropriate because it will promote judicial
 25 economy and will avoid the risk of overcompensation in the event that Plaintiff is successful on
 26 appeal. First, a stay is in the interest of judicial economy. As the Ninth Circuit has stated in
 27 another context, waiting until after all appeals have been exhausted to adjudicate a fee
 28

1 application “avoids the possibility that multiple fee applications will be necessary, a weighty
 2 consideration given that EAJA fees are intended specifically for individuals with limited
 3 resources.” Al-Harbi v. Immigration and Naturalization Serv., 284 F.3d 1080, 1084 (9th Cir.
 4 2002). Given that it would save both the resources of the Court and the parties to consider a fee
 5 application by Plaintiff once at the conclusion of all appeals, rather than twice, a stay is clearly in
 6 the interest of judicial economy.

7 A good example of how a stay would promote judicial economy is demonstrated by the
 8 requirement in EAJA that fees may be only allowed if the United States’ position was not
 9 “substantially justified.” 28 U.S.C. § 2412(d)(1)(A). Substantial justification in this context
 10 means “justification to a degree that could satisfy a reasonable person.” Pierce v. Underwood,
 11 487 U.S. 552, 565 (1988). In determining substantial justification, court must consider “the
 12 reasonableness of both the underlying government action at issue and the position asserted by the
 13 government in defending the validity of the action in court,” or in other words, the government’s
 14 litigating position. See Bay Area Peace Navy v. United States, 914 F.2d 1224, 1230 (9th
 15 Cir.1990) (quotations omitted). Further, when determining the reasonableness of the
 16 government’s litigation position, the Court must look to the entirety of the case, not just what
 17 occurs in the district court. See United States v. Rubin, 97 F.3d 373, 375 (9th Cir.1996) (EAJA
 18 “favors treating a case as an inclusive whole, rather than as atomized line items”) (quoting
 19 Comm’r, INS v. Jean, 496 U.S. 154, 161-62 (1990)); Bullfrog Films, Inc. v. Wick, 959 F.2d
 20 782, 784 (9th Cir. 1992) (“The district court is to take into account the totality of the
 21 circumstances in deciding whether the government’s position is substantially justified.”).

22 In the event that the Court’s summary judgment decision is reversed on appeal, the Court
 23 will have to entertain two fee petitions and, for both of them, would have to inquire whether,
 24 based on the case as a whole, the government’s position was substantially justified. This
 25 completely redundant inquiry would be avoided by staying Plaintiff’s current petition and
 26 evaluating the issue of fees once after all litigation is complete. Moreover, because the Court’s
 27 inquiry into the reasonableness of the government’s litigation position must be made on the basis
 28

1 of the case as an “inclusive whole,” Rubin, 97 F.3d at 375, and because that inquiry may be
2 influenced by the outcome of the litigation in the Court of Appeals, the Court cannot fully
3 evaluate whether the Government’s position was substantially justified at this time. Thus,
4 judicial economy is clearly promoted by granting the motion to stay.

5 In addition to promoting judicial economy and economy of the parties, granting the stay
6 would avoid the risk that Plaintiffs will be overcompensated for the time spent on this case.
7 Plaintiff seeks compensation for work that is allegedly related to the parties’ stipulated request
8 for dismissal of certain of Plaintiff’s claims prior to briefing on the merits. However, Plaintiff
9 openly admits that it has not separated its work by the claims involved in the case. See, e.g.,
10 Pl.’s Decl. of Roger Flynn (“Flynn Decl.”) ¶ 7 (some larger tasks, including researching and
11 writing the parties’ pleadings, “were not specifically delineated by issue”); Pl.’s Decl. of Jeffrey
12 C. Parsons (“Parsons Decl.”) ¶ 7 (same); Pl.’s Decl. of Joshua Borger (“Borger Decl.”) ¶ 6
13 (same). Thus, Plaintiff is not only claiming compensation for work on issues resolved by
14 stipulation, but also for issues that it lost in this Court and which are pending before the Ninth
15 Circuit.

16 Although Defendants question whether such undifferentiated billing is ever appropriate,
17 it is clear that here it creates great risk of over compensation. If successful on appeal, Plaintiff
18 might choose to bring a second fee application seeking compensation for some of those same
19 hours, and if unsuccessful on appeal, Plaintiff will have received payment for work on claims for
20 which it did not prevail. The Court will be better situated to evaluate whether Plaintiff is seeking
21 double recovery or payment for issues on which it did not prevail if it evaluates all of Plaintiff’s
22 requested hours at once, rather than in the piecemeal fashion currently sought by Plaintiff. Thus,
23 not only would a stay promote judicial economy, but it would also better avoid a result that
24 overcompensated Plaintiff for the hours spent on its case.

25 CONCLUSION

26 For the foregoing reasons, Federal Defendants’ motion to stay litigation of Plaintiff’s fee
27 petition should be granted.
28

1 Respectfully submitted this 9th day of November 2005,

2
3 KELLY A. JOHNSON
Acting Assistant Attorney General

4 Environment and Natural Resources Division

5 /s/ Barclay Samford
6 BARCLAY T. SAMFORD (NM SBN 12323)
Trial Attorney
United States Department of Justice
7 Environment and Natural Resources Division
Suite 945, North Tower
8 999 18th Street
Denver, CO 80202
9 Telephone: (303) 312-7362
Facsimile: (303) 312-7379
10 Clay.Samford@usdoj.gov
BRIAN C. TOTH (Virginia SBN 48843)
11 Trial Attorney
United States Department of Justice
12 Environment and Natural Resources Division
P.O. Box 663
13 Washington, D.C. 20044-0663
Telephone: (202) 305-0639
14 Facsimile: (202) 305-0506
Brian.Toth@usdoj.gov
15

16 Of Counsel:

17 ROSE MISKOVSKY
18 U.S. Department of Agriculture
Office of General Counsel
19 33 New Montgomery Street, 17th Floor
San Francisco, CA 94105-1924
20 Telephone: (415) 744-3158
Facsimile: (415) 744-3170
21

22 Attorneys for Federal Defendants.
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2005, I electronically filed the foregoing FEDERAL DEFENDANTS' MOTION TO STAY LITIGATION OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Joshua Borger	srmeredith@envirolaw.org
James Russell Wheaton	sarah-rose@thefirstamendment.org
Roger Flynn & Jeffrey C. Parson	wmap@igc.org
Robert Dabney Eastham	dabneylaw@sisqtel.net
James L. Buchal	Counsel@buchal.com , ccaldwell@mblp.com

/s/ Barclay Samford

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

KARUK TRIBE OF CALIFORNIA,

Plaintiff,

v.

UNITED STATES FOREST SERVICE;
MARGARET BOLAND, Forest Supervisor,
Klamath National Forest,

Federal Defendants,

and

THE NEW 49ers, Inc. and RAYMOND KOONS,

Defendant-Intervenors.

Civ. No. 04-4275 (SBA)

**[proposed] ORDER GRANTING
FEDERAL DEFENDANTS'
MOTION TO STAY
PLAINTIFF'S PETITION
FOR ATTORNEYS' FEES**

The matter is before the Court upon Federal Defendants' motion to stay litigation of Plaintiff's petition for attorneys' fees. It is hereby ORDERED that Federal Defendants' motion is GRANTED. Litigation on Plaintiffs' fee petition is hereby STAYED. If Plaintiffs wish to renew their fee petition at the conclusion of their appeal, they shall do so by filing a request to lift the stay within 30 days of the expiration of the time required for filing for a certiorari petition after any decision by the Court of Appeals.

It is SO ORDERED.

Dated:

HON. SAUNDRA BROWN ARMSTRONG
United States District Judge